American Bar Association
www.supremecourtpreview.org

No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General of New York,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CONNECTICUT FAIR HOUSING CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JONATHAN R. MACEY
Counsel of Record
YALE LAW SCHOOL
CAPITAL MARKETS CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-7913

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

INTEREST OF THE *AMICUS CURIAE*.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT 4

I. AS A MATTER OF HISTORICAL MEANING, THE NEW YORK ATTORNEY GENERAL'S REQUEST IS NOT AN EXERCISE OF VISITORIAL POWERS. 4

A. Historically, Visitorial Power Refers Only to State Supervision of the Internal Affairs of Corporations. 6

1. The concept of visitorial power originated to describe the supervision of the internal affairs of chartered organizations – ecclesiastical forms, charitable or eleemosynary institutions, and municipal corporations – for compliance with their charters. 6

2. The same "internal affairs" understanding of the scope of the visitorial power persisted through the time of the National Bank Act.....10

B. In Contrast, the New York Attorney General's Request for Information on Discriminatory Lending Does Not Involve Internal Affairs, Even if Its Method Is Similar to Methods of Exercising Visitorial Powers. 18

1. Discriminatory lending practices are not internal affairs. 18

TABLE OF CONTENTS—continued

Page

2. The similarity between the Attorney General's method and common methods of exercising visitorial powers is inapposite. 19

3. The affirmation of state escheat powers in § 484 is inapposite. 22

II. THE STATE OF NEW YORK'S ENFORCEMENT ACTIONS DO NOT IMPLICATE THE POLICY MOTIVATIONS UNDERLYING THE PROHIBITION ON STATE EXERCISE OF VISITORIAL POWERS. 25

A. Preemption of State Visitorial Powers Is Justifiable to the Extent that State Banking Regulations Externalize Costs to Consumers in Other States and Undermine Federal Banking Regulation. 25

B. State Enforcement of Fair Lending Laws In Mortgage Origination by National Banks Will Generate Costs and Benefits Only Within the State and Does Not Threaten To Create External Costs. 29

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. McKean, 1 F. Cas. 489 (C.C.D. Me. 1833) 15
Am. *Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992) . 11
Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) 23
Arbour v. Pittsburgh Produce Trade Ass'n, 47 Wis. 670 (1870) 16
Attorney-General v. Mayor of Galway, 1 Molloy 95 (Ir. Ch. 1828) 8
Att'y Gen. v. R.R. Co., 35 Wis. 425 (1874) 9
Att'y Gen. v. Tudor Ice Co., 104 Mass. 239 (1870) . 17
Barnett Bank of Marion County, N. A. v. Nelson, 517 U.S. 25 (1996) 28
Cipolone v. Ligget Group, Inc., 505 U.S. 504 (1992) 30
Clearing House Ass'n v. Cuomo, 510 F.3d 105 (2d Cir. 2007) 19, 27
Cook County, Illinois v. United States ex rel. *Chandler*, 538 U.S. 119 (2003) 11
Dominus Rex v. Episopum Chester, 93 Eng. Rep. 855 (K.B. 1727) 7
Eldred v. Ashcroft, 537 U.S. 186 (2003) 4
Guthrie v. Harkness, 199 U.S. 148 (1905) 14, 18
First Nat'l Bank of San Jose v. California, 262 U.S. 366 (1922) 23
First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640 (1924) 14, 18
First Nat'l Bank of Youngstown v. Hughes, 6 F. 737, 740 (C.C.D. Ohio 1881) 15
Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921) 11

TABLE OF AUTHORITIES—continued

Page(s)

Hale v. Henkel, 201 U.S. 43 (1906) 11, 13
Hawes v. City of Oakland, 104 U.S. 450 (1881) 11
McClellan v. Chipman, 164 U.S. 347 (1896) 32
Outlon v. Sav. Inst., 84 U.S. 109 (1872) 11
People ex rel. *Att'y Gen. v. Utica Ins. Co.*, 15 Johns. 358 (N.Y. Sup. 1818) 17
Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007) 4
Philips v. Bury, 990 Eng. Rep. 198 (1692)..... 7
Planter's Bank v. Sharp, 47 U.S. 301 (1848)..... 11
Ross v. Bernhard, 396 U.S. 531, 537 (1970)..... 11
Runkel v. Winemiller, 4 H. & McH. 429 (Md. Gen. 1799) 17
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)..... 4
State ex rel. *Circuit Att'y v. Saline County Court*, 51 Mo. 350 (1873)..... 9
State ex rel. *McGill v. Cook*, 138 N.W. 432 (Minn. 1912) 15, 16
State ex rel. *Waring v. Georgia Med. Soc.*, 38 Ga. 608 (1869) 10, 17
State v. Milwaukee Chamber of Commerce, 3 N.W. 760 (Wis. 1879) 9, 17
State v. Nelson Co., 45 N.W. 33 (N.D. 1890) 21
Trs. of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)..... 7
United States v. Union Pac. R.R. Co., 98 U.S. 569 (1878) 12, 13
Utah v. Evans, 536 U.S. 452 (2002) 4
Venner v. Chicago City Ry. Co., 92 N.E. 643 (Ill. 1910) 17

TABLE OF AUTHORITIES—continued

Page(s)

Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005)..... 27
Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007)..... 14, 28, 31
Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)..... 24
Wilson v. United States, 221 U.S. 361 (1911)..... 10

STATUTES, RULES AND REGULATIONS

12 U.S.C. § 85 (2000)..... 32
12 U.S.C. § 484(a) (2000) 5, 25, 28
12 U.S.C. § 484(b) (2000) 22
15 U.S.C. § 1691(a) (2000)..... 31
15 U.S.C. § 1691 (2000)..... 33
Mich. Comp. Laws Ann. §445.1655 (West 2002)... 32
Pub. L. 97-320, 96 Stat. 1521 (Oct. 15, 1982)..... 22
12 C.F.R. pt. 30, App. A (2001) 30
69 Fed. Reg. 1908 (2004)..... 33, 34

MISCELLANEOUS

William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *The Geography of Opportunity* (Xavier de Souza Briggs ed., 2005) 30
Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* (John Lathrop ed., 7th ed. 1861).....passim
Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427 (2007) 4
Annand K. Bhattacharya et al., *An Overview of Mortgages and the Mortgage Market*, in *The*

TABLE OF AUTHORITIES—continued

Page(s)

Handbook of Mortgage Backed Securities (Frank J. Fabozzi ed., 6th ed., 2005). 31
Henry Cohen, *Escheat of Unclaimed Deposits in Financial Institutions*, Congressional Research Service (July 16, 1980) 23, 24
Charles B. Elliott, *A Treatise on the Law of Private Corporations* (Howard S. Abbott ed., 4th rev. ed. 1911) 20, 21
Escheat of Unclaimed Moneys in National Banks: Hearing on S. 111 Before a Subcomm. of the Comm. on the Judiciary, 68th Cong. 2 (1924) (statement of Hon. Frank M. Eastman, Special Deputy Att'y Gen. of Pennsylvania) 23
Vincent Di Lorenzo, *Federalism, Consumer Protection and Regulatory Preemption: A Case for Heightened Judicial Review*, 10 U. Pa. J. Lab. & Emp. L. 273 (2008)..... 28
Stewart Kyd, *A Treatise on the Law of Corporations* (1794)..... 9
Note, *Inquisitorial Powers of Federal Administrative Agencies*, 48 Yale L.J. 1427 (1939) 12
A.C. Pigou, *Economics of Welfare* (MacMillan & Co., 1920) 26
Henry L. Pitts, Comment, *Corporations – Equitable Interventions in Corporate Affairs – Meaning of "Internal Management,"* 35 Mich. L. Rev. 1085 (1939)..... 12
Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369 (1936).....passim

TABLE OF AUTHORITIES—continued

Page(s)

Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 Cath. U. L. Rev. 1 (1979) 24
David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal. L. Rev. 1125 (1999) 27
Samuel D. Thompson, *Commentaries on the Law of Private Corporations* (2d ed. 1908) .....passim

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a nonprofit, public interest organization dedicated to ensuring equal housing opportunity to all Connecticut residents and to combating discriminatory housing practices. In the more than one-hundred cases it has filed in both state and federal courts to enforce fair housing laws, the Connecticut Fair Housing Center has witnessed the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices. Over the last few years, the Office of the Comptroller of the Currency ("OCC") has sought to immunize national banks from the reach of state laws and state law enforcement. The interest of the Connecticut Fair Housing Center in this case stems from its desire to ensure that Connecticut customers of national banks benefit from the critical protections afforded by state law and state officials' enforcement efforts, and that its litigation on behalf of Connecticut residents is not burdened by federal preemption of state fair housing laws.

SUMMARY OF THE ARGUMENT

There is no basis in history or policy for federal preemption of the New York Attorney General's

[1] A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or counsel made a contribution to the preparation or submission of this brief.

request for information regarding lending abuses. First, the Attorney General's request is not an exercise of the "visitorial power" as understood historically. Thus, the National Bank Act, which prohibits states from exercising "visitorial powers" over national banks, should not be interpreted through regulation or otherwise to preempt the Attorney General's action. Second, the costs and benefits of the Attorney General's request are localized within New York. His request, consequently, raises none of the concerns about costly externalities that underlie Congress's policy of preempting visitorial powers under the National Bank Act.

Historical Meaning of "Visitorial Power"

As a matter of historical meaning, the "visitorial power" refers only to state supervision of the internal affairs of corporations for consistency with their charters, and not to state regulation generally. Originating in supervision of ecclesiastical forms, charitable institutions, and municipal corporations, the visitorial power enabled the state to ensure the compliance of these organizations with their charters and donative intents. The same understanding of the limited scope of the visitorial power – to assure compliance with charter procedures and limitations on chartered power – naturally transferred to the term's original extension to business corporations in Anglo-American law. This internal affairs understanding persisted at the time of the enactment of the National Bank Act, as leading treatises, this Court's precedent, and numerous lower court examples demonstrate.

In contrast, the New York Attorney General's request for information on discriminatory lending

falls well outside of this historical meaning. It has nothing to do with the internal affairs of the bank as a chartered entity. Furthermore, the similarity in method between the Attorney General's request for information and the historical exercise of some of the visitorial power by inspection of records is inapposite. The historical record demonstrates that states also used such methods in the exercise of non-visitorial power, such as the police power. Similarity in method is thus a red herring.

Economic Policy Undergirding the National Bank Act

Furthermore, enforcing antidiscrimination measures with respect to locally originated mortgages does not implicate the policy concerns that undergird federal preemption of visitorial powers. The federal policy underlying the preemption of visitorial powers aims to prevent states from regulating national banks in ways that give rise to externalities that (1) make the operation of a national bank untenable, or (2) render national banks uncompetitive in other states. Fair lending regulation targeting mortgage origination within a state's borders does not create such a risk of adverse effects in other states. New York State does not seek to investigate discriminatory lending patterns across the entire geographical range in which banks do business, but only with respect to loans originated within the state. By limiting its inquiries to the banks' operations within the state, and by making no requirements on the corporate or financial structure of the banks, New York avoids any concern of externality problems.

Any residual concerns about antidiscrimination measures giving rise to a patchwork of regulations

should be allayed in light of the fact that the racially discriminatory lending practices that New York seeks to investigate are a violation of federal law. State enforcement of federal antidiscrimination regulations does not create a risk of preventing national banks from creating uniform national banking standards or burdening financial institutions with a patchwork of conflicting state regulations. Thus, the most important motivation for the proscription against visitorial powers is simply inapposite in this case.

ARGUMENT

I. AS A MATTER OF HISTORICAL MEANING, THE NEW YORK ATTORNEY GENERAL'S REQUEST IS NOT AN EXERCISE OF VISITORIAL POWERS.

The touchstone of statutory interpretation is congressional intent. The statutory language is "[t]he most probative evidence of congressional intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). To analyze the text, this Court relies on the meaning of words at the time of the statute's enactment. See *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) ("At the time of the FSIA's adoption in 1976, a "lien" was defined as . . . ."); *Eldred v. Ashcroft*, 537 U.S. 186, 199-200 (2003) (emphasizing that "[a]t the time of the Framing, that word meant what it means today"); *Utah v. Evans*, 536 U.S. 452 (2002) (arguing that "[f]urther support is added [to the Court's interpretation] by contemporaneous general usage, as exemplified by late-18th-century dictionaries defining 'enumeration'"). Without attention to historical meaning, absurdity often results. See Jack M. Bal-

kin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 429-31 (2007) ("In 1787 the words "domestic Violence" [in the Republican Government Clause] generally meant riots or disturbances within a state (as opposed to foreign attack); today the words primarily refer to assaults and batteries by intimates or by persons living in the same household.").

In this case, the key provision of the National Bank Act prohibits the exercise of "visitorial powers" by the states. 12 U.S.C. § 484(a). As a matter of historical meaning, visitorial powers only refer to state supervision of the internal affairs of corporations. Originating in supervision of ecclesiastical forms, charitable institutions, and municipal corporations, the visitorial power enabled the state to ensure the compliance of these organizations with their charters. The same understanding of the limited scope of visitorial power – to assure compliance with the charter procedures and limitations on chartered power – naturally transferred to the term's original extension to business corporations in Anglo-American law, and persisted at the time of the enactment of the National Bank Act, as leading treatises, this Court's precedent, and lower court examples demonstrate.

In contrast, the New York Attorney General's request for information on discriminatory lending does not involve internal affairs. It has nothing to do with the functioning of the bank as a chartered entity. Furthermore, the similarity in method between the Attorney General's request for information and the exercise of some the visitorial power by inspection of records and suits to enjoin action is inapposite because the historical record demonstrates that states

used such methods in the exercise of non-visitorial power, such as the police power.

A. Historically, Visitorial Power Refers Only to State Supervision of the Internal Affairs of Corporations.

1. The concept of visitorial power originated to describe the supervision of the internal affairs of chartered organizations – ecclesiastical forms, charitable or eleemosynary institutions, and municipal corporations – for compliance with their charters.

a. *The visitorial powers emerged to supervise the compliance of charities and churches to donative intent.* Visitorial powers arose in ancient Rome and the Middle Ages to provide for supervision of charities and churches for compliance with their intrinsic purposes by ecclesiastical supervisors. Justinian, for example, provided that bishops should supervise the execution of donations for pious purposes, ordering "the most holy bishops [to] see that all such testamentary dispositions are observed in accordance with the intentions of the deceased." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369 (1936) (quoting Justinian's Code). Canon law also commanded bishops to visit dioceses and parishes to prevent abuses. *Id.* at 369-70 (quoting canon law and church constitutions); see Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 686, at 637 (John Lathrop ed., 7th ed. 1861).

Eventually, as religious charities declined and secular and lay charities multiplied, the visitorial power began to rest in the founder of the charity and his heirs. Pound, *supra*, at 371. The "origin of such a

power," as one treatise writer puts it, "is the property of the donor, and the power every one has to dispose, direct, and regulate his own property." Angell & Ames, *supra* § 687, at 637 (paraphrasing Lord Hardwicke). The purpose of this visitorial power was to aid donors "looking to the security of the funds, and that the interest or income of them be applied according to the bequest." *Id.* § 687, at 638. When the founder or appointed visitor passed away, visitorial power passed to the government. *Id.* § 695, at 652 ("It is now, however, well settled, in England, that if there be no person who can act as visitor, the duties of that office devolve upon the king; which it then becomes the task of the Court of Chancery to execute . . . ."). See *Dominus Rex v. Episopum Chester,* 93 Eng. Rep. 855 (K.B. 1727) (issuing mandamus to corporate officer where the officer was also the visitor, on the grounds that the court had to exercise the visitorial power where dual office-holding prevented the officer from visiting himself).

The visitorial power provided the ability to supervise the internal workings of the organization. Visitors of colleges could "correct abuses, remove officers . . . expel or admit a fellow, and generally superintend the management of the trusts." Angell & Ames, *supra*, § 688, at 640. In *Philips v. Bury*, for example, the visitor of a college traveled to it and upon being rebuffed by the rector and scholars, deprived the rector of his position. 990 Eng. Rep. 198, 201 (1692). See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 674 (Story, J., concurring) ("The nature and extent of this visitatorial power has been expounded with admirable fulness and accuracy by Lord HOLT in one of his most celebrated judgments. *Phillips v. Bury*."); Angell & Ames, *supra*, § 689, at 644-45 (discussing the same).

The courts "put the visitorial power in motion" to aid these private visitors. Angell & Ames, *supra*, § 689, at 645. Visitorial powers could be extended beyond internal workings by an organization's charter, but supervision of internal affairs constituted an inherent power. *Id.* § 689, at 644.

This makes the visitorial power similar to the power to supervise trusts. In fact, when trustees or a board of governors were involved in the government of a college or academy, the "the visitatorial power [wa]s deemed to belong to them." *Id.* § 687, at 639. As Dean of the Harvard Law School Roscoe Pound summarized, "[t]here is as much ground for saying that the jurisdiction over charitable institutions is visitatorial as there is for saying that the visitation of such institutions rests on a jurisdiction over trusts." Pound, *supra*, at 374.

b. *The Transition to Municipal Corporations.* The application of the visitorial power to municipal corporations began the transition toward use of the concept in the context of business corporations. As "common law courts were called on in the course of private litigation to pass upon the reasonableness of borough customs and by-laws," it "became easy to say that as municipal corporations had no founders and so were not subject to visitation by any private visitors, they were subject to visitation by the King." Pound, *supra*, at 370.

Here, too, the power was used to enforce the internal by-laws and procedures of the corporations. For example, in *Attorney-General v. Mayor of Galway*, the Attorney General proceeded against the Mayor of Galway on the grounds that the town was violating its charter. 1 Molloy 95 (Ir. Ch. 1828). The

terms of the charter provided that certain tolls be used for walling and paving the town. The Attorney General's suit, noting that the streets had been neglected and the walls had fallen into decay, requested that the municipality be required to repair the pavements out of the proceeds of the tolls, under the supervision of the court. The court agreed. *Id.* See *Att'y Gen. v. R.R. Cos.*, 35 Wis. 425, 523-24 (1874) (upholding visitorial power of the Attorney General to proceed for corporate violation of charter); Pound, *supra*, at 372. Similarly, in *State* ex rel. *Circuit Att'y v. Saline County Court*, the government proceeded against a county to enjoin issuance of bonds to pay an unauthorized subscription of railroad company stock. 51 Mo. 350 (1873). See Pound, *supra*, at 383. As Pound recognized, the injury in these cases was not harm to the public, but violation of the charter. *Id.* at 383.

c. *The Extension of Visitorial Powers to Business Corporations.* The concept eventually was extended to government supervision of the internal affairs of business corporations for compliance with their chosen forms. By the time of the reception of the English common law into America, it was widely recognized that "[e]very corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations." *State v. Milwaukee Chamber of Commerce*, 3 N.W. 760 (Wis. 1879); see 2 Stewart Kyd, *A Treatise on the Law of Corporations* 17 (1794) (observing that all corporations were subject to visitation "in order to maintain the peace and good government of corporations and secure their adherence to the purposes of their institution."). As one leading treatise summarizes, "[i]t may now be said that in the United States

visitorial power over all corporations – except private eleemosynary corporations – existing under and by virtue of the laws of the state, rests in the state." 1 Samuel D. Thompson, *Commentaries on the Law of Private Corporations* § 476, at 581 (2d ed. 1908).

The visitorial power's placement in the state stemmed from the state's power to grant or deny charters to the corporations. See *id.* (noting that "all corporations emanate from legislative enactment, so the visitorial powers are lodged in the state"); *State v. Georgia Med. Soc'y*, 38 Ga. 608, 627 (1869) (noting that the fact that a corporation accepted a charter makes it subject to the state's visitorial jurisdiction). See also *Wilson v. United States*, 221 U.S. 361 (1911) (holding that the visitorial power is strong enough to force disclosure of records, despite any self-incrimination that may result).

2. The same "internal affairs" understanding of the scope of the visitorial power persisted through the time of the National Bank Act.

By the time of the application of the concept of "visitorial powers" to business corporations in America, therefore, the term "visitorial powers" had a rich but unified history: it was applied to several different types of corporations and institutions, but always to supervise the internal affairs of such corporations and institutions against their charters or donative intentions. This understanding persisted at the time of the enactment of the National Bank Act: the visitorial power was understood to encompass only the power to review the internal affairs of corporations, such as compliance with the charter, acts exceeding the charter's authority, and internal management procedures. Leading treatises, this Court's precedent,

and lower court examples all confirm this understanding of the scope of visitorial powers.

a. *Leading treatises affirm the internal affairs understanding.* The leading treatises confirm this understanding. In the leading treatise, *Law of Private Corporations Aggregate*,[2] Joseph Angell and Samuel Ames write that "[t]o render the charters or constitutions, ordinances, and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation." Angell & Ames, *supra*, § 684, at 636 (emphasis in original). In other words, the visitorial power assures compliance with internal rules of corporations.

Thompson on Corporations[3] similarly remarks that the visitorial power consists of being an "ever-present visitor in the internal management of corporations . . . the state checks and controls corporate affairs." Thompson, *supra*, § 475, at 580. The "purposes of visitation," Thompson continues, is based on the fact that individuals are liable "to deviate from the end of their institutions." *Id.* §477, at 582. As Dean Pound summarizes when explaining the power of mandamus in the visitorial context, "the basis of mandamus . . . is the visitorial jurisdiction of the

---

[2] This Court relied on the treatise over forty times in corporate law cases during the nineteenth and early twentieth centuries. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 86 (1906); *Hawes v. City of Oakland*, 104 U.S. 450, 458 (1881); *Outlon v. Sav. Inst.*, 84 U.S. 109, 119 (1872); *Planter's Bank v. Sharp*, 47 U.S. 301, 311 (1848); see *Cook County, Illinois v. United States* ex rel. *Chandler,* 538 U.S. 119, 127 (2003).

[3] This Court has relied on this treatise several times as well. *E.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 266 (1992); *Ross v. Bernhard*, 396 U.S. 531, 537 (1970); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 596 (1921).

state over all corporations which it has created . . . It [the visitorial jurisdiction] lies to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters." Pound, *supra*, at 375. See Henry L. Pitts, Comment, *Corporations – Equitable Interventions in Corporate Affairs – Meaning of "Internal Management,"* 35 Mich. L. Rev. 1085, 1086 (1939) (comparing visitorial powers to "internal affairs" of corporation, such as stockholder interactions). See also Note, *Inquisitorial Powers of Federal Administrative Agencies*, 48 Yale L.J. 1427, 1428-29 (1939) (noting that "the term 'visitorial powers' refers only to the authority to regulate and supervise banking practices, and that disclosure of information relating to national banks [to assess] truthful disclosure in registration statements . . . can hardly be charged with attempting to exercise visitorial powers.").

b. *This Court's precedent both explicitly affirms and operates in the shadow of the internal affairs understanding.* This Court's precedent echoes this limitation of the visitorial power to internal affairs. In *Union Pacific Railroad Co.*, the Court schematized the "legislative power of Congress" over "franchises" to all "fall under two heads":

> 1. Where municipal, charitable, religious, or eleemosynary corporations, public in their character, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds, and as they, from the nature of their corporate functions, were more or less under government supervision, the Attor-

> ney-General proceeded against them to obtain correction of the abuse; or,
>
> 2. Where private corporations, chartered for definite and limited purposes, had exceeded their powers, and were restrained or enjoined in the same manner from the further violation of the limitation to which their powers were subject.

United States v. Union Pac. R.R. Co., 98 U.S. 569, 617-18 (1878). In short, this Court recognized that the visitorial power prevents either offenses against the charter or corporation actions in excess of the charter.

Similarly, in *Hale v. Henkel*, Justice Brewer repeatedly affirmed the limitation of visitorial powers to internal affairs. 201 U.S. 43 (1906) (Brewer, J., dissenting). In that case, the Court rejected a federal visitorial power over state corporations that nullifies the protections of the Fourth Amendment. Justice Brewer defined the visitorial power by remarking, uncontested by the opinion of the Court, that

> it is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a state has chartered it, the power is lodged in the state. If the nation, then in the nation; and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

Id. at 86. After quoting Angell & Ames, Blackstone, and Kent for the same definitions of the visitorial power, Justice Brewer concluded that "[t]he right of

visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers." *Id.* at 87.

Following *Hale*, in *Guthrie v. Harkness* this Court recognized that the right of an individual stockholder to inspect the books of his corporation was not visitorial. 199 U.S. 148 (1905). On its way to that holding, this Court approvingly quoted Bouvier's law dictionary, that visitation is "the act of examining into the affairs of a corporation." *Id.* at 157. Even more explicitly, this Court approvingly quoted a treatise on mandamus that "[v]isitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." *Id.* at 158 (quoting Merrill on Mandamus). Finally, and relatedly, in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), this Court distinguished between the power to enforce a corporation's charter against itself and the power to enforce state laws, holding that the former was visitorial while the latter was not.

More recently, this Court acted consistently with this historical understanding of the visitorial power in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). In that case, it was conceded by the parties, and accepted without argument by this Court, that Michigan's mortgage registration and inspection requirements were visitorial in nature, and thus preempted by the National Bank Act for, at least, national banks. *Id.* at 1568. The requirements by Michigan in that case went to the heart of the internal affairs of the bank subsidiary: they required registration and empowered the state to revoke registration.

Id. at 1566.[4] In essence, the state was conducting its own monitoring of the compliance of the subsidiary of the national bank with state-established charter requirements. Compliance with charter requirements, however, is the essence of the visitorial power.

Lower court precedent sounds a similar note. In *Allen v. McKean*, 1 F. Cas. 489, 498 (C.C.D. Me. 1833) (Story, Circuit Justice), for example, the court argued that the visitorial power is the "power to control and arrest abuses, and to enforce a due observance of the statutes of the charity." Similarly, in *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C.D. Ohio 1881), cited approvingly in *Guthrie*, 199 U.S. at 158, the court held that "visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance of its [the corporation's] law and regulations."

c. Examples of court review of the visitorial power confirm the internal affairs understanding. Examples of exercises of the visitorial power provide the best method for understanding its scope and limits. In *State* ex rel. *McGill v. Cook*, 138 N.W. 432 (Minn. 1912), for example, the court rejected a challenge to an unincorporated association's action in violation of its by-laws on the ground that the state lacked visitorial power over unincorporated associations. In

[4] They also required submission of annual reports, certain types of file-keeping, and inspections, all methods of the exercise of visitorial powers. *Watters*, 127 S. Ct. at 1566. See *infra*, Part I.B.2 (arguing that the methods of the exercise of a power do not determine the type of power).

reaching this result, it acknowledged the visitorial power of the state over violations of the by-laws of incorporated associations. In that case, the national organization Modern Woodsmen of America passed a resolution requiring higher membership fees. A local lodge of the Woodsmen voted to use its funds to advocate for repeal of this fee increase, but an official in the local lodge refused to appropriate the funds. The suit was brought to command appropriation. The court rejected the challenge:

> The law of this state applicable to the question is that a writ of mandamus will issue only to compel the performance by an inferior tribunal, corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations.

Id. at 434. It then ruled that the local lodge was an unincorporated association, beyond the power of the state. *Id.*

Similarly, in *Arbour v. Pittsburgh Produce Trade Ass'n*, 47 Wisc. 670 (1870), the court resolved a dispute over the by-laws of an incorporated trade association. The court removed the relevant by-laws, regarding sale on credit, from the enforcement action. It noted that "the visitorial or superintending power of the state over corporations created by the legislature will always be exercised, in proper cases,

through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises." *Id.* at 679-80. In both of these cases, courts demonstrated that the visitorial power restrains corporations from violating their charters. See *State* ex rel. *Waring v. Georgia Med. Soc'y*, 38 Ga. 608 (1869) (issuing mandamus to reinstate plaintiff into medical society because his expulsion violated corporation law); *Runkel v. Winemiller*, 4 H. & McH. 429 (Md. Gen. 1799) (same for minister and congregation); *State v. Milwaukee Chamber of Commerce*, 3 N.W. 760 (Wis. 1879) (declaring its power to review by-laws and procedures of corporation but upholding corporation's decision because of its compliance with those procedures); Angell & Ames, *supra*, at § 702, at 659-60 (collecting cases, *inter alia*, compelling swearing in of insurance director, restoring banking corporation directors, and admitting entitled members to trade association).

Courts also acted to prevent corporate behavior in excess of their charter. In *People* ex rel. *Attorney General v. Utica Insurance Co.*, 15 Johns. 358 (N.Y. Sup. 1818), for example, the court policed the boundaries of a corporation that lacked charter power to engage in banking. Similarly, in *Attorney General v. Tudor Ice Co.*, 104 Mass. 239 (1870), the Attorney General sued to enjoin a private corporation from engaging in business other than the ice trade, particularly trade in oil, tobacco, and other products. In *Venner v. Chicago City Railway Co.*, 92 N.E. 643, 647 (Ill. 1910), the court remarked that the visitorial power extended to corporate behavior beyond the charter such as "monopolies, unlawful combinations, and unreasonable exactions from corporations enjoying special franchises and privileges."

Finally, courts repeatedly affirmed the limitation of the visitorial power to internal affairs of the corporation in their refusal to exercise power. Most prominently, they rejected jurisdiction over shareholder's rights to inspect books, a common-law right not related to the visitorial power of the state over corporations. *Guthrie*, 199 U.S. at 158; Thompson, *supra*, § 476, at 581; Pound, *supra*, at 388. They also rejected claims that state regulation of branches was visitorial. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

B. In Contrast, the New York Attorney General's Request for Information on Discriminatory Lending Does Not Involve Internal Affairs, Even if Its Method Is Similar to Methods of Exercising Visitorial Powers.

1. Discriminatory lending practices are not internal affairs.

The above discussion demonstrates that as a historical matter the visitorial power of states extended only to regulation of a corporation's internal affairs. Actions involving compliance with the procedural provisions of corporate charters or by-laws, suits to prevent corporation actions in excess of charters, and other similar proceedings constitute the core of the visitorial power. Other state laws, such as those involving common law shareholder's rights, for example, did not constitute an exercise of visitorial powers.

The New York Attorney General's information request does not involve internal affairs. On the contrary, the Attorney General's request relates to a particular bank practice that has nothing to do with the internal functioning of the bank as a corporation.

The Attorney General only requested information concerning mortgage polices and practices and data concerning loans related to real property. *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 109 (2d Cir. 2007).

2. The similarity between the Attorney General's method and common methods of exercising visitorial powers is inapposite.

To be sure, the methods of exercising the visitorial power are similar to the method employed by the New York Attorney General in this case. But this similarity is inapposite because the method of exercise of a power does not determine the source of that power. States routinely employed the methods in this case in ways that courts recognized were exercises of non-visitorial powers, such as the general police power, and they exercised other methods that courts recognized were exercises of the visitorial power. In short, similarity in method is a red herring because the nature of the power, not the method of its exercise, determines whether that power is visitorial or otherwise. The method of exercise is neither a necessary nor sufficient condition for the power's classification as visitorial.

The visitorial power, admittedly, was exercised through inspection of records and suits to enjoin practices. Thompson, *supra*, § 481, at 585 ("A state in the exercise of its visitorial power may, through its officers, call on corporations for information as to their business and the method of transacting it."); *id.* § 480, at 585 (referring to "the power which the state has to supervise by way of injunction"); *id.* § 486, at 588; Angell & Ames, § 684, at 636; Charles B. Elliott, *A Treatise on the Law of Private Corporations* § 90,

at 94 (Howard S. Abbott ed., 4th rev. ed. 1911); Pound, *supra*, at 374.

But other non-visitorial powers were also exercised through inspection of records and suits to enjoin practices. The police power provides the best example. Under the police power states are able to require the filing of reports for inspection. Thompson, *supra*, § 440, at 510 ("A familiar exercise of the police power of the state over corporations is found in the statues of most of the states requiring corporations at stated periods to make and file with some public officer of the state or county, reports of their business transactions and financial condition"); Elliot, *supra*, § 92, at 98 ("All private corporations may be required to make periodical reports of their capital, business and general condition to a state board or official."). States may also bring suit to procure such records if not filed. Thompson, *supra*, § 440, at 510; Elliot, *supra*, § 92, at 98. Thus, mere requirement of inspection of records does not make a state's action visitorial in nature.

States are also able to enjoin behavior contrary to the public interest pursuant to the police power; they need not rely on the visitorial power. The police power extends, "there is general agreement," to "the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals." Thompson, *supra*, § 421, at 480. One "method of the state's exercise of its police power is through its judicial department" and it was "generally, if not universally, conceded, that courts have jurisdiction to issue what have been termed prerogative writs, as well as the common-law and equitable writs, in proper actions against corporations . . . to prevent them from doing acts that are illegal or against public policy." *Id.* § 468, at 579. For example,

in *State v. Nelson Co.*, 45 N.W. 33 (N.D. 1890), the court issued an injunction to prevent the issuance of "seed-grain bonds." Thus, mere pursuit of action to prevent corporate behavior also does not make a state's action visitorial in nature.

The police power, of course, is a power different from the visitorial power, as its discussion in leading treatises demonstrates. Thompson on Corporations, for example, divides state control into the police power, Thompson, *supra*, §§ 420-468, at 478-579, and the visitorial power. Thompson, *supra*, §§ 475-486, at 580-88. Compare Elliott, *supra*, § 109, at 119 (discussing the visitorial power), with *id.* § 90, at 94 (discussing the police power). The police power itself applies to corporations. Thompson, *supra*, § 433, at 496 ("That the police power extends alike to individuals and corporations has been abundantly established."); Elliott, *supra*, § 109 at 119 ("Corporations, like individuals, are subject to the police power of the state.").[5]

Additionally, the visitorial power was exercised through methods other than inspection. Courts restored members, see Thompson, *supra*, § 480, at 583-84 (collecting cases); set aside contracts, see Elliott, *supra*, § 252, at 320-21, and performed other activities, see *id.* § 253, at 322 ("To entertain an action to dissolve a corporation, to determine the validity of its organization; to determine which of two rival organi-

[5] Strictly speaking, of course, the visitorial power is a subset of the police power, see Thompson, *supra*, § 481, at 585 (referring to the visitorial power as a "branch of the police power"), but this does not undermine the argument that a state may regulate a corporation under the latter without invoking the former. *Id.* § 475, at 580-81 (contrasting police power as "passive, while visitorial power is active").

zations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividends, or to compel it to make one; to restrain it from issuing its bonds, or from making an additional issue of stock – would clearly all be the exercise of visitorial powers or the corporation, or an interference with the management of its internal affairs.").

The foregoing analysis demonstrates that the method of the exercise of a power does not make that power visitorial. On the contrary, as the previous section indicated, the visitorial power is involved only when the state action supervises the internal affairs of the corporation. On that test, discriminatory lending regulation is a far cry from supervision of deviations from charter procedures and actions in excess of charter-granted powers.

3. The affirmation of state escheat powers in § 484 is inapposite.

The federal respondents argued in their brief in opposition, Brief for Federal Respondent in Opposition, at 13 n.4, that this internal affairs understanding of visitorial power is inconsistent with 12 U.S.C. § 484(b), which authorizes an exception on the prohibition on visitorial powers for states to "review" a bank's records "to ensure compliance with applicable State unclaimed property or escheat laws." The problem with this argument is that § 484(b) was added in 1982, in the context of congressional doubt regarding the ability of states to enforce their escheat laws. Pub. L. 97-320, 96 Stat. 1521 (Oct. 15, 1982). In this context, § 484(b) is an affirmation of the historical meaning of visitorial powers, not an attack on it.

As a Congressional Research Service Report on the topic summarizes, conflicting determinations of

this Court and the OCC created confusion as to a state's ability to enforce its escheat laws against national banks. Henry Cohen, *Escheat of Unclaimed Deposits in Financial Institutions*, Congressional Research Service (July 16, 1980). First, two decisions of this Court created an uncertain test for the survival of escheat laws. In *First National Bank of San Jose v. California*, 262 U.S. 366 (1922), this Court held that two California laws providing for escheat of unclaimed deposits to the state were invalid as applied to national banks. At the time, this decision provoked reactions by the states. See *Escheat of Unclaimed Moneys in National Banks: Hearing on S. 111 Before a Subcomm. of the Comm. on the Judiciary*, 68th Cong. 2 (1924) (statement of Hon. Frank M. Eastman, Special Deputy Att'y Gen. of Pennsylvania) (proposing a statutory fix and describing *San Jose* as enacting a sea change: in that case "the right of the several States to escheat unclaimed deposits in the hands of national banks, which right had heretofore been generally conceded, was denied").

A later decision of this Court, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), undermined *San Jose* by upholding Kentucky's escheat law. But, as the Report notes, *Luckett* did not clarify the doctrine. Rather, it was still the case that "a state's reporting requirements [to enforce escheat laws] in a particular instance conceivably might be so burdensome as to interfere with a national bank's performance of its functions, in which case the requirements would be impermissible." Cohen, *supra*, at 8. States were still left both fearful and uncertain of their abilities.

The OCC's behavior exacerbated state concerns in this uncertain doctrinal world. The Report notes that the Comptroller of the Currency "'has vigorously

denied access to state officials' under 12 U.S.C. § 484." *Id.* at 8 n.5 (quoting Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 Cath. U. L. Rev. 1, 39 (1979)). In short, as the Report summarized, state ability to enforce escheat laws was at best uncertain and at worst at a low ebb:

> State escheat laws are applicable to federally-chartered institutions, except that they may not infringe upon federal law or burden the functioning of a federally-chartered institution. This apparently also holds true for provisions in state escheat laws providing for bank examinations.

Cohen, *supra*, at 15.

In this context, interpreting the passage of § 484(b) to transform the well-established internal affairs meaning of the visitorial power would be inappropriate.[6] Rather, the new section modestly seeks to clarify a confused area of law, in effect reaffirming the historical internal affairs meaning of the visitorial power cast into doubt by this Court's conflicting interpretations and the aggressive behavior of the OCC.

* * *

---

[6] Such an interpretation also would be finding an elephant in a mousehole, see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes."), given the vast authority, as evidenced by the case and treatise citations in this brief, for the internal affairs understanding of the visitorial power.

The foregoing demonstrates that the historical meaning of visitorial power is the state's control of the internal affairs of a corporation. That power – forbidden by § 484(a) – is not implicated by the New York Attorney General's investigation, which involves discrimination, not corporate internal management.

II. THE STATE OF NEW YORK'S ENFORCEMENT ACTIONS DO NOT IMPLICATE THE POLICY MOTIVATIONS UNDERLYING THE PROHIBITION ON STATE EXERCISE OF VISITORIAL POWERS.

A. Preemption of State Visitorial Powers Is Justifiable to the Extent that State Banking Regulations Externalize Costs to Consumers in Other States and Undermine Federal Banking Regulation.

The historical meaning of "visitorial powers" emphasizes oversight of the internal affairs of a corporation and not merely regulation of its operations. The historical distinction between visitorial powers and non-visitorial regulation maps neatly onto the policy rationale underlying the NBA's preemption clause. State exercise of truly visitorial authority gives rise to a specific class of economic difficulties, externalities, that non-visitorial regulation does not. As historically understood, the exercise of visitorial power necessarily affects the bank as a whole, with impact on the bank's operations beyond the borders of the regulating state engaged in regulation. While the regulating state may enjoy the local benefits of such visitorial oversight, the costs may be spread nationally to states that do not benefit from the regulatory regime. There are sound reasons grounded in

economic theory for preempting state exercise to avoid the externality problem, but these concerns are not implicated when a state seeks simply to regulate lending activity within its borders, a type of regulation that the framers of the NBA would not have understood as visitorial.

The policy rationale behind federal preemption of state visitorial powers is the same as the general justification for federal preemption of state law. Preemption allows the federal government to achieve uniformity of laws and regulations, which in turn limits the negative effects of diverse or divergent state laws and regulations, in particular negative externalities that occur when regulation in one state has costs that are borne by residents of other states. Defined generally, negative externalities are costs pushed from parties to a transaction onto nonparties. Since the parties to the transaction ignore these costs they are said to be "externalized" on other nontransacting parties. See A.C. Pigou, *Economics of Welfare* (MacMillan & Co., 1920). Externalities represent a form of market failure, invoked to justify regulation to ensure that parties internalize the costs of their transactions.

Federal preemption of state law is a means of minimizing or mitigating the externalities posed by decentralized regulation among states. In environmental law, state regulations may be ineffective in controlling pollution externalities that burden other states. At worst, state regulations may shift costs onto neighboring states entirely. See David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal. L. Rev. 1125, 1189-90 (1999). Since federal legislators incorporate the costs of nationwide regulation, preemption can mitigate

the externalities produced by a patchwork of state regulations.

Preemption also can address the burden on commercial parties seeking to comply with a wide array of state regulations. Without a uniform standard, individual states can internalize the benefits of laws and regulations tailored to their political needs and shift the costs of compliance to commercial parties doing business in each state. If an individual state's regulatory burden on manufacturers is higher than other states, prices nationwide may rise, creating an externality on consumers living in states with lower standards. The economic case is strongest when state regulations pose externalities by forcing compliance above and beyond that demanded by either competing state laws or national regulatory standards. As the Second Circuit explained, the presumption against preemption "'disappears' in the context of national banking regulation, which has been 'substantially occupied by federal authority for an extended period of time.'" *Clearing House Ass'n*, 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005)).

This economic rationale underlies Congress's intent to allow preemption of state visitorial powers over national banks. State laws regulating national banks with operating subsidiaries across the country can pose a significant source of externalities on the financial services in other states. Advocates from the banking industry express the concern that diverse state and local laws might lead to "higher operating costs and higher prices for financial services; and at worst to reduction of available credit and fewer product options." Vincent Di Lorenzo, *Federalism, Consumer Protection and Regulatory Preemption: A Case for Heightened Judicial Review*, 10 U. Pa. J.

Lab. & Emp. L. 273, 300 n.116 (2008). Since banks operate across jurisdictions, compliance with the "myriad of state laws" can hamper competition and favor locally operating banks over their national rivals. *Id.*

Sensitive to the ability of state regulations to threaten or unbalance existing national bank regulations, the National Banking Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a) (2000). Though this Court in *Watters* upheld the OCC's interpretation of the NBA as covering bank subsidiaries, the underlying policy rationale for preemption of state visitorial powers remains that

> States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.

Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1567 (2007); see *Barnett Bank of Marion County, N. A. v. Nelson*, 517 U.S. 25, 32 (1996).

The Court in *Watters* delineated the proper scope of state flexibility to regulate national banks, only permitting regulations or laws that do not unduly burden bank functions or discriminate against federal laws. The goal of avoiding externalities stemming from state regulation of national banks is at the heart of this balance. Preemption of state banking

regulations is most defensible when such regulation poses substantial externalities and disrupts uniform national standards, but the scope of the OCC's preemptive authority is not unlimited. If a state regulation's costs are limited to its jurisdiction, the key policy argument underlying the preemption of the state exercise of visitorial powers disappears. New York's enforcement of fair lending laws is precisely the type of highly localized, consumer-oriented regulation that should not be preempted.

B. State Enforcement of Fair Lending Laws In Mortgage Origination by National Banks Will Generate Costs and Benefits Only Within the State and Does Not Threaten To Create External Costs.

State enforcement of fair lending laws does not run afoul of the policies that motivate the NBA's prohibition on the exercise of visitorial powers. New York does not seek to regulate national banks as corporate entities in the traditional sense of "visitorial powers," but seeks only to regulate one aspect of the banks' local operations. Mortgage origination is a highly localized activity with prices set at the level of individual loans. Any costs attendant to compliance with the state's enforcement efforts will be borne solely by residents of New York, and not by the banks' customers in other states. Because the residents of New York will fully internalize the effects of the regulations adopted by the State, the OCC's attempted preemption has no foundation in the policy underlying federal preemption of visitorial powers. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipolone v. Ligget Group, Inc.,* 505 U.S. 504, 516 (1992). The OCC's unwar-

ranted expansion of federal preemption should be rejected.

In attempting to investigate discriminatory lending practices, the State of New York is responding to data which show that racial minorities are more likely to receive expensive "subprime" mortgages than others of similar credit quality. See William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *The Geography of Opportunity* 101 (Xavier de Souza Briggs, ed. 2005). These subprime mortgages are more likely to result in foreclosure than other loans, with adverse effects on property values and the quality of neighborhoods within the state. New York therefore has a profound interest in the nature of mortgages written against real estate within the state.

While New York will benefit from regulating discrimination in the origination of high-risk mortgages within its borders, it is clear that any costs attendant to this regulation will fall on residents of the state as well. Mortgage origination is an inherently individualized activity, requiring attention to the particular borrower seeking a loan. See 12 C.F.R. pt. 30, App. A (2001) (describing the standards for prudent underwriting of mortgages). Though technology has simplified mortgage underwriting, it is still the case that originating a loan and determining the appropriate interest rate involves close attention to the borrowers' financial condition, the value of a parcel of real estate, and the prospects of the local real estate market. See Annand K. Bhattacharya et al., *An Overview of Mortgages and the Mortgage Market*, in *The Handbook of Mortgage Backed Securities* 17-27 (Frank J. Fabozzi ed., 6th ed., 2005). Because banks originate and price mortgages individually, there can

be no concern that antidiscrimination regulation imposed on mortgage origination practices in New York would impact mortgage origination in any other state. If New York's enforcement efforts increase the costs of taking mortgage applications in New York, these costs can readily incorporated into the price of the mortgages originated in the state. Because the fair lending regulations apply to *all* originators, see 15 U.S.C. § 1691(a), all lenders will bear such costs and compliance will not render national banks uncompetitive within the state.

The critical distinction between regulation of local mortgage origination and the regulation of national banks themselves is aptly demonstrated by contrasting New York's antidiscrimination measures with the regulatory regime rejected in *Watters*, 127 S. Ct. at 1568. Enforcement of broadly applicable fair lending legislation stands in sharp contrast with the extensive state regulation of mortgage originators rejected in *Watters*. In that case, Michigan sought to subject a mortgage originator to a comprehensive registration and regulatory regime in a manner sure to generate spillover effects in other states. In fact, the State of Michigan did not even challenge the classification of the powers exercised by the Office of Insurance and Financial Services as visitorial in nature. *Watters*, 127 S. Ct. at 1568. For example, the regulations in question in *Watters* included minimum net worth requirements for originators, and prescribed the means by which net worth is computed. Mich. Comp. Laws Ann. § 445.1655 (West 2002). A minimum net worth requirement necessarily impacts the mortgage originator as a firm; it is not possible for a single national originator to maintain a different financial structure in different states. Because regulations requiring a particular net worth affect

the financial structure of the entire firm, they inevitably have impact beyond a state's borders. The state requirement effectively displaces any federal minimum, or a federal policy of adopting no such requirement. The comprehensive regulation at stake in *Watters* therefore gives rise to the problems that the prohibition on visitorial powers was designed to address.

By contrast, New York's efforts to enforce federal antidiscrimination laws do not affect the mortgage originator as a firm. If a national bank must take extra care in originating New York mortgages, this does not impact the structure of the bank with adverse effects in other states, but simply affects the firm's operations in New York. Fair lending laws are much closer in this respect to usury regulations that have historically been reserved to the states. 12 U.S.C. § 85 (2000). Like fair lending regulations, and unlike the regulation at stake in *Watters*, usury laws regulate the origination of loans, but impose no direct requirements on the corporate entity engaged in lending. As such, neither usury laws nor fair lending regulations "significantly burden a national bank's own exercise of its real estate lending power." *Watters*, 127 S. Ct. at 1567. Usury laws themselves, are simply a subset of "general state laws," *McClellan v. Chipman*, 164 U.S. 347, 357 (1896), including contract, tort, and mundane laws such as zoning restrictions, which are never preempted unless they "expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them." *Id.*

Enforcing antidiscrimination measures with respect to *locally* originated mortgages does not implicate the policy concerns that undergird federal

preemption of visitorial powers. It is notable in this context that New York State does not seek to investigate discriminatory lending patterns across the entire geographical range in which banks do business, but only with respect to loans originated within the state. The former case would be far more concerning, since New York would be seeking to regulate the entire bank and not simply the banks' New York operations. Such geographically wide-ranging regulation would impact the bank's operations in other states, and potentially give rise to the externalities that undergird Congress's preemption policy. By limiting its inquiries to the bank' operations within the state, and making no requirements on the corporate or financial structure of the banks, New York avoids any concern of externality problems.

Finally, any residual concerns about antidiscrimination measures giving rise to a patchwork of regulations should be allayed in light of the fact that the racially discriminatory lending practices that New York seeks to investigate are a violation of federal law. 15 U.S.C. § 1691 (2000). State enforcement of federal antidiscrimination regulations does not create a risk of preventing national banks "from operating in the manner authorized under Federal law," 69 Fed. Reg. 1908 (2004), or of creating a patchwork of "multiple . . . often unpredictable, different state . . . restriction." *Id.* Thus, the most important motivation for the proscription against visitorial powers is simply inapposite in this case.

Because the residents of New York State bear the cost of foreclosures and financial distress arising out of abusive, discriminatory lending practices, and because they alone bear the increased costs should the state undertake measures that are excessively "costly and burdensome," 69 Fed. Reg. 1908 (2004),

the State of New York is best situated to strike the appropriate balance. These powers are not "visitorial" as understood historically, and they raise none of the concerns about costly externalities which underlie Congress's policy of preempting visitorial powers under the National Bank Act. The OCC should not be permitted to undermine the State of New York's legitimate role in protecting its residents against lending abuses based on an overly broad reading of the meaning of "visitorial powers."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JONATHAN R. MACEY
Counsel of Record
YALE LAW SCHOOL
CAPITAL MARKETS CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-7913

Counsel for Amicus Curiae

MARCH 2009